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No. 02-1632

IN THE
Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari
to the Washington Court of Appeals, Division III

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The State does not contest that this case presents an exceptionally important issue of criminal procedure regarding criminal sentencing law in numerous states. Nor is there any disagreement as to how Washington law – or any other state's law that is impacted in this case – works: Statutes require courts to sentence defendants within certain standard sentencing ranges unless they find aggravating facts that are not already encompassed in the elements of the crimes of conviction. Additional statutory provisions cap the extent of upward departures, but it remains that courts may not depart upward in the first place without finding aggravating facts to be present.

Although the State advances a series of arguments aimed at deflating the need for review of the constitutionality of such sentencing systems, none of them is persuasive. This Court, accordingly, should grant certiorari to resolve the pressing question of how *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to facts necessary for departing upward from such statutory standard sentencing ranges.

A. The Issue Whether the Top of a Statutory Standard Sentencing Range Functions as a "Statutory Maximum" Under *Apprendi* is One of Federal Law, Over Which the States' Highest Courts are Squarely Divided.

In *Buchanan v. Washington*, No. 02-7807, the only other time this issue has been before this Court, the State "concede[d] that the Kansas sentencing scheme involved in *State v. Gould* [23 P.3d 801 (Kan. 2001)] is materially indistinguishable from Washington's Sentencing Reform Act (SRA) at issue in the present case. The Washington Supreme Court's holding in *Gore*," the State continued, "is thus in *direct conflict* with *Gould*." Brief in Opp., *Buchanan v. Washington*,

No. 02-7807, at 16 (emphasis added). The State in *Buchanan* nevertheless urged this Court to deny certiorari on the ground that the petitioner had stipulated both to the facts supporting her "exceptional sentence" and to the State's ability to seek such a sentence. *Id.* at 13-16. With that potential vehicle problem not present in this case, the State now suggests that this "so-called split of authority" is an "illusory dilemma" because the question what constitutes a "statutory maximum" for purposes of triggering the protections of *Apprendi* is one of state, not federal, law. Brief in Opp. at 15.

The State obviously had it right the first time. *Apprendi* laid down a rule of federal constitutional law: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the *prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added). In other words, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – *no matter how the State labels it* – must be found by a jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (emphasis added); *see also Apprendi*, 530 U.S. at 501 (Thomas, J., concurring). The issue here, therefore, is not whether Washington *labels* the top of a standard sentencing range as a statutory maximum. It is whether the top of a standard sentencing range *functions* as a statutory maximum. *Id.*; *see also Apprendi*, 530 U.S. at 494 (constitutional issue "is not one of form, but of effect").

As to that question, there is no dispute concerning how Washington law (just like the law of the other states implicated in this conflict, *see* Pet. for Cert. at 15-16 & nn. 7-8) works. Following a conviction or guilty plea, courts are required to impose a sentence within the statutory standard range unless they find aggravating facts, by a preponderance of the evidence, that support imposing an exceptional sentence. Rev. Code Wash. §§ 9.94A.120(1)-(2); *see also* Brief in Opp. at 10

(acknowledging that court is "bound" to applicable grid box unless it finds facts supporting exceptional sentence). "A reason offered to justify an exceptional sentence can be considered only if it takes into account factors *other than those which are used in computing the standard range sentence for the offense*." *State v. Gore*, 143 Wn.2d 288, 315-36 (2001) (emphasis added). If a court finds such factors and decides to impose an exceptional sentence, separate provisions of law cap the extent to which the court can increase the defendant's sentence. Rev. Code Wash. §§ 9A.20.121 & 9.94A.120(14).

In light of this underlying state law, the federal question presented by this case is whether the top of a statutory standard sentencing range such as Washington's operates as a "statutory maximum" as *Apprendi* defines that term, 530 U.S. at 490, so that factual findings necessary to increase a sentence above such a range must be submitted to a jury and proved beyond a reasonable doubt. State courts, expressly applying *Apprendi*, are squarely divided on that important issue. *See* Pet. for Cert. 8-9.* Only this Court can resolve this conflict.

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* Since the Petition for Certiorari was filed, yet another state has been drawn into this confusion. Although Arizona does not call its sentencing laws "guidelines," it, just like Washington, sets statutory "presumptive sentences" from which courts may depart upward only if they find aggravating facts not encompassed in the elements of the underlying crime. *See State v. Brown*, 70 P.3d 454, 456-57 (Ariz. App. May 23, 2003). Such facts need not be submitted to a jury or established beyond a reasonable doubt. An Arizona trial court ruled that this scheme violated *Apprendi* because the presumptive sentences set "maximums" as *Apprendi* defines that term. *Id.* at 457, 460 (describing trial court's decision). Although the Arizona Court of Appeals acknowledged that the trial court's decision was consistent with the Kansas Supreme Court's in *Gould*, it adopted the reasoning of the other side of the split and reversed on the ground that another statutory provision capping the maximum for upward departures renders *Apprendi* inapplicable to the tops of presumptive sentences. *Id.* at 462. The court of appeals distinguished *Ring* on the basis that "[i]n non-capital cases, aggravators need be supported only by reasonable evidence,

B. The Decision Below Contravenes This Court's Precedent.

The State contends that the Washington Supreme Court's opinion in *Gore* and the Court of Appeals' decision here following that opinion are consistent with this Court's precedent because (1) statutory standard sentencing ranges "operate[] solely to limit the sentencing court's discretion within the range already available to it," Brief Opp. at 11 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)); and (2) "the purpose of the standard range is to provide some uniformity in sentencing for those who commit a 'typical' offense," Brief in Opp. at 10. Neither of these arguments withstands scrutiny.

1. The State's *McMillan* argument rests on a flawed premise. While the State is correct that *McMillan* and *Harris v. United States*, 536 U.S. 545 (2002), hold that *Apprendi* does not apply to laws that merely dictate a certain sentence "within a range already available" to a sentencing court pursuant to the defendant's guilty plea, *McMillan*, 477 U.S. at 88, Washington's exceptional sentence laws permit sentences that are *not* already available to courts. Under Washington statutes, a sentencing court "shall impose" a sentence "within the standard sentence range" unless it finds that additional facts, not already encompassed by the jury verdict or guilty plea, support an exceptional sentence. Rev. Code Wash. §§ 9.94A.120(1) & (2); *see also* § 9.94A.390 (setting forth illustrative list of aggravating circumstances). Alternately stated, at the moment a defendant pleads or is found guilty of a crime, the only sentencing range that is legally available to a Washington court is the standard range. Imposing an exceptional (*i.e.*, an increased) sentence is not an option unless and until a court

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not proven beyond a doubt." *Id.* at 462 n.9 (quotation and citation omitted). It never explained why *Apprendi* should apply differently to increases in non-capital sentences.

finds the presence of an aggravating fact not encompassed in the elements of the underlying crime. *Gore*, 143 Wn.2d at 315. Accordingly, the procedures for finding such an additional fact are governed by *Apprendi*, not *McMillan*.

The State's argument, in fact, essentially repeats the same contention that the State of Arizona advanced in *Ring* – namely, that a certain sentence is available to a sentencing court, regardless of whether additional findings are necessary to impose it, so long as a provision of state law says that the sentence is a permissible punishment for the crime of conviction. But, as this Court explained in rejecting that argument, "[t]he Arizona first-degree murder statute authorizes a maximum penalty of death only in the formal sense, . . . for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before the imposition of the death penalty. If Arizona prevailed on [this] argument, *Apprendi* would be reduced to a meaningless and formalistic rule of statutory drafting." *Ring*, 536 U.S. at 604 (internal quotations and citation omitted).

The State does not attempt to distinguish *Ring*. Nor does it contest that the maximum sentence that Washington statutory law permits in Petitioner's case, in the absence of finding aggravating factors not encompassed in his guilty plea to second degree kidnapping, was 53 months. As such, the procedures for making such factual findings are subject to *Apprendi*. Washington law's "formal" acknowledgment, *id.*, that Petitioner's sentence could exceed 53 months if aggravating facts were found does not affect the result here.

2. The State's argument regarding "uniformity" is equally misguided. Whether the sentencing laws at issue are intended to provide uniformity is irrelevant under *Apprendi*. The laws in *Apprendi* and *Ring* presumably were designed to provide uniformity by laying out specific facts that courts needed to find before they could impose stiffer sentences, but

this legislative goal made no difference in those cases. All that matters under *Apprendi* is whether the statutory scheme at issue subjects a defendant to heightened punishment contingent on the finding of a fact, without requiring that fact to be found by a jury beyond a reasonable doubt.

In any event, Petitioner's argument does not threaten the consistency that Washington's Sentencing Reform Act is aimed at generating. All Petitioner's argument seeks is to require the State to allege facts supporting exceptional sentences in indictments and, if defendants contest them, to prove them to a jury beyond a reasonable doubt, instead of by a preponderance to a judge. Contrary to the State's suggestion (Brief in Opp. at 22), such a rule would not require "calling in a jury every time" the State alleged aggravating factors. Such factors could form the basis for plea bargaining just like any other element of a crime. Nor is there any reason to believe that the Washington Legislature would have any problem with such a change or would abolish structured sentencing in response to it. "[S]tructural democratic constraints" tend to push legislative bodies towards preserving laws that foster proportionate criminal punishment. *Apprendi*, 530 U.S. at 490 n.16.

C. This Case is an Excellent Vehicle for Considering the Question Presented.

None of the State's attempts to cast this case as an unsuitable vehicle for deciding the question presented has merit.

1. The State's assertion (Brief in Opp. at 13-14, 16) that Petitioner's sentence does not rest in part on a finding of "deliberate cruelty" is simply untrue. In affirming Petitioner's sentence, the Court of Appeals ruled that "[w]hether or not deliberate cruelty under former RCW 9.94A.390(2)(a) (1997) could be used to elevate the sentence for second degree

kidnapping, the alternate basis of domestic violence *with deliberate cruelty* supports the exceptional sentence here." Pet. App. 17a n.4 (emphasis added). Lest there be any doubt, the Court of Appeals' opinion cites to Rev. Code Wash §§ 9.94A.390(2)(h)(ii) & (iii) as codifying the aggravating factors upon which it was relying. Pet. App. 17a. The latter statutory provision refers to committing domestic violence when "[t]he offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim."

Even if the Court of Appeals had relied solely on the trial court's finding of domestic violence within the sight or sound of a child in upholding Petitioner's exceptional sentence, it would not in any way have removed the *Apprendi* issue from this case. The State acknowledges that committing domestic violence within sight or sound of a child "is not an actual or traditional element of kidnapping or assault." Brief in Opp. at 14. That is precisely why that fact was not included in Petitioner's guilty plea. It also is precisely why he had the right to force the State to prove it under the procedures mandated by *Apprendi* before a court could use it as a basis to increase his sentence beyond the maximum permissible for the bare offenses of kidnapping and assault.

2. Nor is the State's harmless error argument credible. That a jury in a pretrial hearing found (by clear and convincing evidence) that Petitioner was competent to stand trial (*see* Brief in Opp. at 16-17) has no bearing on whether it would have found that he acted with deliberate cruelty in committing the offenses at issue. These are two different inquiries aimed at assessing the defendant's mental state at different points in time. A defendant is competent to stand trial if, at the time of trial, he "is capable of properly understanding the nature of the proceedings against him [and] he is capable of rationally assisting his legal counsel in the defense of his cause." *State v. Wicklund*, 96 Wn.2d 798, 800 (1982). In contrast, a defendant

acts with deliberate cruelty if, at the time of the crime, he inflicts "gratuitous violence or [engages in] other conduct which inflicts physical, psychological, or emotional pain as an end in itself." Pet. App. 16a (quoting *State v. Scott*, 72 Wn. App. 207, 214 (1993)). The jury was never asked during the pretrial competency proceeding to consider the latter issue.

Only a few concluding words are necessary concerning the State's argument (Brief in Opp. at 17-20) that a jury, if asked to do so, would have found the aggravator of domestic violence with deliberate cruelty. Regardless of the extent to which various historical, underlying facts were actively contested in proceedings below, Petitioner plainly and consistently disputed the suggestion that he acted with deliberate cruelty here. The trial court termed this issue a "complex" one and noted that "[t]here has always been, in this case, a great deal of dispute about such things as [Petitioner's] mental condition at the time that these offenses occurred [and Petitioner's] motivation for doing what he did." Pet. App. 32a, 46a. Like the sentencing court in *Apprendi*, 530 U.S. at 470, 475, in fact, the trial court held a "full evidentiary hearing" that lasted for three days on the issue. This case history is more than enough to show that the trial court's refusal to submit the proposed aggravators to a jury may have affected the outcome here. And it is more than enough to demonstrate that this case is an excellent vehicle for resolving the *Apprendi* question presented.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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